Supreme Court, U.S.
FILED

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No. _____ 93 1481 JAN 25 1994

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

HEATHER C. HINTON, *Petitioner*,

v.

PACIFIC ENTERPRISES, formerly PACIFIC LIGHTING CORPORATION, as Employer, Plan Administrator, Plan Sponsor and Plan Fiduciary, PACIFIC LIGHTING CORPORATION DISABILITY BENEFIT PLAN, PACIFIC LIGHTING CORPORATION MEDICAL PLAN, PACIFIC LIGHTING CORPORATION DENTAL PLAN, PACIFIC LIGHTING CORPORATION PENSION PLAN, PACIFIC LIGHTING CORPORATION LIFE INSURANCE PLAN, and KATHE R. MOORE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE NINTH CIRCUIT OF THE
UNITED STATES COURT OF APPEALS

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PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

QUESTION PRESENTED

Should the Court exercise its supervisory power over the circuit courts under Supreme Court Rule 10.1.(a) by granting certiorari and immediately remanding this case to the U.S. Court of Appeals for the Ninth Circuit to decide a major issue properly raised in, but not decided by, the circuit court, namely whether the district court committed prejudicial error when it dismissed one of Hinton's two claims under the Employee Retirement Income Security Act of 1974 (ERISA)?

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==========

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

==========

Heather C. Hinton ("Hinton" or "Petitioner") respectfully requests that a writ of certiorari issue and that the Supreme Court immediately remand this case to the U.S. Court of Appeals for the Ninth Circuit with an order directing it to rule on whether the U.S. District Court for the Central District of

California improperly dismissed Hinton's First Claim for Relief against the Defendant ERISA Plans.

PUBLISHED OPINION

The Opinion of the U.S. Court of Appeals for Ninth Circuit, published as Hinton v. NMI Pacific Enterprises (etc., et al.) at 5 F.3d 391, is reprinted in Appendix A. Appendix B is a true copy of the Order denying Hinton's Petition for Rehearing. Appendix C is a true copy of the District Court's Order of Dismissal and Remand. Appendix D is a true copy of the minute order granting the Plans' F.R.Civ.P. Rule 12(b)(6) motion to dismiss. Appendix E is a true copy of the relevant parts of the reporter's transcript of the district court's ruling granting the motion.

JURISDICTION

The judgment of the United States

Court of Appeal for the Ninth Circuit was entered on September 17, 1993. The Order denying a timely Petition for Rehearing was entered on October 27, 1993. A writ of certiorari is available from this court to review a final judgment of the Ninth Circuit of the U.S. Court of Appeals. 28 U.S.C. § 1254, subd. (1).

Lower federal courts had jurisdiction because the case involves federal questions (several sections of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 et seq.) and a pendent state claim for legal malpractice. 28 U.S.C. §§ 1331 and 1367(a).

The Ninth Circuit had jurisdiction to hear the appeal of the Order of Dismissal and Remand by the U.S. District Court for the Central District of California, a final decision for purposes

of appeal. 28 U.S.C. § 1291.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 et seq., specifically ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

2. The Due Process Clause of the Fifth Amendment to the United States Constitution, which provides,

> ". . . nor shall any person . . . be deprived of life, liberty, or property without due process of law; . . . "

STATEMENT OF THE CASE

SUMMARY OF ARGUMENT

After she became disabled, Petitioner Heather Hinton ("Hinton") sued her employer, Pacific Enterprises ("Pacific") and its employee benefit

plans ("the Plans"). The first claim for relief was against the Plans for disability and medical benefits under § 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)(B). This claim was based solely on the plan terms.

Hinton's second claim was against her former employer, Pacific, for wrongfully interfering with her receipt of plan benefits by terminating her employment during her disability in violation of ERISA § 510, 29 U.S.C. § 1140.

District Court's Ruling

The district court first granted Pacific's F.R.Civ.P. 12(b)(6) motion to dismiss Hinton's second claim on statute of limitations grounds, without leave to amend. The Plans then filed a F.R.Civ.P. 12(b)(6) motion to dismiss Hinton's first

claim for employee benefits from defendant Plans for failure to state a claim for which relief could be granted. The Plans argued that no benefits were due because Hinton's employment had been "terminated" and she could not contest this termination because a wrongful termination lawsuit or an ERISA § 510 action was barred by the statute of limitations. Accepting this argument, the district court dismissed Hinton's claim against the Plans without leave to amend.

Although the district court characterized Hinton's claim against the Plans as being "dependent upon the claim against Pacific" (Opinion, p. 10022), this is neither correct nor controlling.

Appeal -- No Decision

Hinton appealed both district court rulings and, although the Ninth Circuit's

Opinion so notes (at p. 10022), the decision only addresses the ruling on the first motion. **The Ninth Circuit made no decision, one way or the other, about Hinton's appeal from the district court's dismissal of her first claim for relief, the claim against the Plans.** It remanded Hinton's third claim for related legal malpractice by attorney Moore to a California court for decision.

Separate Legal Question Raised

Hinton's ERISA § 502(a)(1)(B) claim against the Plans raises a question of law independent of and separate from her § 510 claim against Pacific. Tolle v. Carroll Touch, Inc., 977 F.2d 1129, 1135 (7th Cir. 1992), on remand, 813 F.Supp. 1368 (C.D. Ill. 1993). The claim for benefits focuses not on the employment termination, but on the Plans' denial of disability benefits based on their

interpretation of a specific term in the Disability Plan. The first amended complaint alleges in ¶10:

> "Under a proper interpretation of the plan terms, the facts and circumstances of this case are not such as to constitute a 'termination of employment' under the plan language cited." (Aplt. App. 9, 4)

If true, this allegation means that the Plan improperly denied Hinton's claim for benefits. This improper denial of benefits does not depend on Pacific's reason for terminating Hinton or whether that termination has been timely challenged. For purposes of a motion to dismiss under F.R.Civ.P. 12 (b)(6), plaintiff Hinton's allegations must be taken as true.

Hinton Entitled to Discovery

Hinton claims she is entitled to discovery to show that the word "termination" as used in the Disability Plan and in the Summary Plan Description (provided to employees as required by ERISA, 29 U.S.C. §§ 1022 and 1024(b)) did not mean or could not lawfully mean the kind of termination she experienced. The district court will be asked to look at the terms of the summary plan description (see Appendix to Hinton's Reply Brief) which allows terminations to cause a loss of disability benefits only under specific circumstances. None of these circumstances applies here. Since summary plan descriptions are required to contain such information (29 C.F.R. § 2520.102-3(l)), the district court may find the defendants to have abused their discretion by so interpreting the plan.

Arnold v. Arrow Transp. Co. of Delaware, 926 F.2d 782, 784-86 (9th Cir. 1991), especially n. 3.

Prejudicial Error

Since facts are in dispute, the district court committed prejudicial error when it dismissed this claim before discovery was undertaken. The Ninth Circuit then committed prejudicial error by failing to make any ruling at all on the district court's dismissal of Hinton's claim against the Plans.

The Ninth Circuit's failure to discuss or rule on one of the two major issues of the appeal--involving a different statutory claim and different defendants--despite repeated briefing and no waiver of consideration of the issue, falls below the standard to which the courts of appeal should be held. A circuit court decision on this issue

probably would favor Hinton, and the court's failure to rule was, therefore, prejudicial error.

Writ and Immediate Remand Requested

In Blackburn v. Alabama, 354 U.S. 393 (1957), decided on the merits at 361 U.S. 199 (1960), and many other cases (usually involving an intervening Supreme Court decision or new legislation), the Supreme Court has granted certiorari and immediately referred the case back to a lower court for decision of an issue that should be, but was not, previously decided.

Therefore, Petitioner Hinton respectfully requests that the Supreme Court grant a writ of certiorari and order the Ninth Circuit of the U.S. Court of Appeals to rule on whether the district court improperly dismissed Hinton's claim against the ERISA Plan

defendants.

Issue Preserved for Appeal

Hinton preserved this issue for appeal and for this petition by opposing the Plans' motion to dismiss in the district court (Aplt. App. 17) and objecting to the ruling in her Appellant's Opening Brief (as her first issue, at 16-17), the Appellant's Reply Brief (at 5-8) and the Petition for Rehearing (2-4). The Appellee's Brief discussed the ruling at 11-14.

STATEMENT OF FACTS

Petitioner Hinton joined Pacific Lighting Corporation, the predecessor of defendant Pacific Enterprises ("Pacific"), as a legal assistant in 1985. Her compensation package included the typical kinds of employee benefits--a retirement plan and disability, medical,

dental and life insurance plans established under and governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 et seq. (Aplt. App. 9, 2.)

When hired, Hinton expected to be protected in case of any disability due to injury or illness. But her plan benefits evaporated when she most needed them.

On January 15, 1988, nine days after Hinton became disabled and unable to work, her self-insured employer (Pacific) informed her that she was being fired. Ten days later, she was deceived and coerced into executing a resignation agreement, written by her employer, outlining the terms of her departure from Pacific. (Aplt. App. 9, 3; Aplt. App. 1, 4; Aplt. App. ex. A.)

Hinton added a paragraph in which

she attempted to preserve her rights to benefits under the company's employee benefit and worker's compensation plans. It read,

> By signing this agreement, I understand that I do not give up my rights to seek reimbursement for disability under Worker's Compensation, the Company's disability insurance policy, and the Company's self-insurance, if any, for disability. I also understand that I do not give up my rights to unemployment insurance after my disability ceases.

(Aplt. App., ex. A.)

Despite her participation in the defendant plans and her attempt to preserve her rights to collect under them, the Disability Plan denied Hinton's application for disability benefits (and

indirectly, other employee benefits) because she had been "terminated." (Aplt. App. 9, 3-4.)

Declaratory Relief Sought

Hinton sought declaratory relief under ERISA § 502, 29 U.S.C. § 1132(a)(1)(B) as to whether she was entitled to benefits under the disability and other defendant plans. (Id.) Hinton's first claim in her first amended complaint alleged:

> "6. By withholding benefits from her to which she was entitled, Pacific forced her to sign a 'resignation' agreement and only then provided her the application for the benefits. . . . Neither the termination nor the resignation is legal, binding or enforceable."
>
> "7. [Omitted.]
>
> "8. The Disability Plan provides,

inter alia, that-- 'No employee shall be eligible to receive Disability Benefits following termination of employment, whether the termination occurs prior to or after the commencement of receipt of Disability Benefits.'

(Aplt. App. 9, 3.)

Based on this provision and Hinton's 'termination,' Disability Plan concluded that Hinton was not entitled to benefits under the Disability Plan."(Id.)

The complaint also contended:

"9. This decision is incorrect, arbitrary, capricious and contrary to law. To uphold it would be to sanction Pacific's improper termination of Hinton's employment, would allow the employer, by the expedient of mere termination,

the right to interfere with the payment of benefits promised under the Disability Plan, and would ratify Pacific's improper threat of withholding just benefits to wrench an involuntary resignation from its employees.

"10. Under a proper interpretation of the plan terms, the facts and circumstances of this case are not such as to constitute a 'termination of employment' under the plan language cited above.

"11. Since Hinton is entitled to benefits under the Disability Plan, she is also then entitled to (1) continued vesting and accrual of benefits

under the Pension Plan; (2) continued coverage under the Medical and Dental Plans; and (3) continued participation in the Life Insurance Plan." (Id. at 3-4.)

District Court's Ruling

On December 9, 1991, in a minute order and without a written opinion, the U.S. District Court for the Central District of California, David V. Kenyon, Judge, granted the Plans' motion to dismiss Hinton's first claim under F.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief could be granted. (Aplt. App. 19; Appendices D and E to this petition.) Thus, the court held that any employment termination, for whatever reason and under whatever circumstances (including a wrongful termination after the onset of

disability) resulted in no right to benefits under Pacific's disability and other employee benefit plans.

The district court ignored Hinton's allegation that

> "[u]nder a proper interpretation of the plan terms, the facts and circumstances of this case are not such as to constitute a 'termination of employment' under the plan language cited. . . ." (Aplt. App. 9, p. 4.)

Instead, the district court found that

> "Plaintiff's first cause of action fails to state a claim as a matter of law because plaintiff admits that she was terminated and as such, Pacific Lighting Corporation Disability Plan's

> decision not to provide her with disability benefits was entirely consistent with the express language of the disability plan provision as cited by the plaintiff." (Appendix E, 4:18-24.)

Hinton argued in the Ninth Circuit that

> "[t]he court clearly does not have the right to make such factual findings in ruling [on] a Rule 12(b)(6) motion. Call v. Sumitomo Bank of California, 881 F.2d at 630."

(Appellant's Opening Brief at 17.)

Limited Evidence Presented

Neither the Plans nor their Summary Plan Descriptions were put in evidence in the district court. A copy of the Summary Plan Description for the Disability Benefit Plan (as provided to

Hinton in a 1985 employee handbook) was attached as an Appendix to Appellant's Reply Brief. It lists various reasons for denial of benefits, none of which are similar to the facts of the present case. (Id., p. DB 3.)

WHY THE WRIT SHOULD BE GRANTED

I.

THE NINTH CIRCUIT'S FAILURE TO RULE ON THE DISMISSAL OF HINTON'S CLAIM AGAINST THE DEFENDANT PLANS WAS PREJUDICIAL ERROR.

A. Petitioner Hinton's Two Claims on Appeal Were Distinct, and a Ruling on One of Them Did Not Properly Dispose of the Other.

Hinton's first claim sought declaratory relief against all Plan defendants under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Hinton could have sued for this claim alone, and her

suit would have been timely because California's four-year statute for written contract claims would have applied. Wang Laboratories, Inc. v. Kagan, 990 F.2d 1126, 1128 (9th Cir. 1993); Cal. Civ. Proc. Code § 337. If the Plan defendants had filed a motion to dismiss for failure to state a claim for which relief could be granted under F.R.Civ.P. 12(b)(6) and the district court had dismissed without leave to amend (as occurred) and Hinton had raised that issue on appeal, she would be entitled to a Ninth Circuit ruling on the legality of that dismissal. A refusal or failure to make any ruling at all would have justified this Court's intervention to prevent this unreasonable "departure from the accepted and usual course of judicial proceedings . . . ." Supreme Court Rule 10.1 (a).

The only difference between this scenario and the present case is that Hinton also sued her employer, Pacific, for damages for firing her to deny her ERISA and other employee benefits in violation of ERISA § 510, 29 U.S.C. § 1140, and the district court dismissed this claim based on the statute of limitations.

The Ninth Circuit recognized that Petitioner's two claims are distinct, saying

> "The two sections [§§ 502 and 510] remedy different wrongs; one section corrects any improper action taken with respect to the benefits plan itself and the other punishes an improper action taken with respect to the individual's employment status."

(App. A, Opinion at 10025.) These claims are not so intertwined that a ruling on the dismissal of Hinton's ERISA § 510 claim against Pacific on statute of limitations grounds is sufficient to properly dispose of her appeal of the dismissal of the ERISA § 502 claim for benefits against the defendant Plans based on the district court's interpretation of a term in the plan documents.

B. The Ninth Circuit Should Have Reversed the District Court's Judgment Because That Court Decided Disputed Evidentiary Issues on a Rule 12(b)(6) Motion Before the Conduct of Any Discovery. Failure to Reverse Was Prejudicial Error.

Standard of Review

This court reviews de novo a trial

court's decision to dismiss under F.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief may be granted. Sax v. World Wide Press, Inc., 809 F.2d 610, 613 (9th Cir. 1987). "The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." Charles Alan Wright and Arthur R. Miller, 5A Federal Practice and Procedure: Civil, 2d § 1357 (West, 1990), p. 321. "In determining whether to grant a Rule 12(b)(6) motion, the court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint also may be taken into account. [Extensive footnote omitted.]" Wright and Miller, id. at 299.

Such a dismissal cannot be upheld "unless it appears beyond doubt that

plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). All allegations of material fact contained in the complaint are taken as true, and the reviewing court construes them in the light most favorable to the plaintiff. Call v. Sumitomo Bank of California, 881 F.2d 626, 630 (9th Cir. 1989); Wright & Miller, supra. If the underlying facts or circumstances relied on by plaintiff may be a proper subject for relief, she ought to be granted leave to amend. Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 226 (1962); F.R.Civ.P. 15(a).

The district court did not honor these legal principles, and the Ninth Circuit did not rule at all on this

issue. The district court's dismissal on a F.R.Civ.P. 12(b)(6) motion was prejudicial error when a factual dispute existed about the meaning of the term "termination" in the Plan and the Summary Plan Description.

Hinton claims that the Summary Plan Description for the Disability Plan did not say that benefits under it and the other plans could be denied under Hinton's circumstances.

If true, Hinton's allegation that her termination "was not such as to constitute a 'termination' under the plan language cited" (Aplt. App. 9, p. 4) means that the Plan improperly denied her claim for benefits--regardless of Pacific's reason for terminating her or whether that reason can be challenged.

Discovery Needed

If allowed to proceed, Hinton will

do discovery and ask the district court to look at the terms of the Summary Plan Description that allow terminations to cause a loss of disability benefits only under specific circumstances, none of which were present here. The lower courts will have the opportunity to determine whether the word "termination" is ambiguous or was unlawfully applied to Hinton.

Summary Plan Description

Since Summary Plan Descriptions are required to contain information about when benefits will or will not be available under the plan (see 29 C.F.R. § 2520.102-3(l)) and the summary plan description here did not list this kind of "termination" as one that would result in a loss of benefits, the district court may find the Disability Plan's "termination" provision as interpreted by

the defendant Plan is unenforceable.

The law requires that the Plan and the Summary Plan Description be consistent, and, under Ninth Circuit law, where they are not, the summary controls. Arnold v. Arrow Transp. Co. of Delaware, 926 F.2d 782, 785, n. 3 (9th Cir. 1990). Challenges to a plan can be based on its summary plan description even if it modifies the terms of the plan. Id.

Otherwise, an employer could create an illusory contract, advising employees of benefit plans that would not be available when needed. See 1 Bernard E. Witkin, Summary of California Law (Bancroft-Whitney Co., 9th ed. 1987), Contracts, § 234 at 241 where he states that an illusory contract under California law is one where one party reserved the unqualified right to cancel or withdraw from an agreement at his

pleasure. The terms of an ERISA plan "must be construed so as to render none of them nugatory and to avoid illusory promises [citation omitted]." DeGeare v. Alpha Portland Industries, Inc., 837 F.2d 812, 816 (8th Cir. 1988) (welfare benefits plan under ERISA), vacated on other grounds, 489 U.S. 1049 (1989).

Here, if any kind of "termination" is enough to deny the disabled employee disability benefits --as the district court held-- then that condition is solely within the control of the employer, Pacific, and the Disability Plan is an unenforceable, illusory contract.

Ninth Circuit Fails To Rule

The Ninth Circuit's Opinion ignores these arguments which were made to it. (Reply Brief, 5-8.) Although the Ninth Circuit's statement of facts mentions

this issue, its opinion does not rule on whether the district court properly dismissed Hinton's claim against the defendant Plans. Instead, the circuit court ruled only that the district court properly dismissed Hinton's claim against Pacific on statute of limitations grounds (Opinion, 5 F.3d 391 at 393-94, Appendix A at 10023-10025) and that the doctrines of tolling and estoppel did not rescue that claim (Opinion, 5 F.3d at 394-97, Appendix A at 10030). Since Hinton's claim against the Plans was timely filed (see Wang Laboratories, Inc. v. Kagan, 990 F.2d at 1128), it could not be dismissed on the same basis as her claim against Pacific.

Even if Hinton's earlier briefing may have confused the circuit court, her timely Petition for Rehearing was crystal clear. The heading for its first section

of Argument reads, "This Court's Opinion Fails to Address the Trial Court's Dismissal of Hinton's First Claim for Relief." (Petition for Rehearing at ii and 2.) Thus, the circuit court was given an opportunity to correct this error but inexplicably and outrageously failed to do so, summarily denying the Petition for Rehearing. (Appendix B.)

Hinton appealed the entire judgment including the dismissal of both of her ERISA causes of action and briefed all issues. Nevertheless, the Ninth Circuit did not rule on the propriety of the district court's dismissal of her claim against the defendant plans. This failure to rule was prejudicial error, particularly since the district court had committed prejudicial error by dismissing a viable claim and making factual rulings on a highly contested matter at too early

a stage of the case.

II.

THIS COURT HAS THE POWER TO GRANT CERTIORARI "WHEN A UNITED STATES COURT OF APPEALS ". . . HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, OR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION."

The U.S. Supreme Court has discretion to grant review on a writ of certiorari when there are "special and important reasons therefor" and

> "(a) When a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this

Court's power of supervision."

28 U.S.C., Supreme Court Rule 10.1 (a) (emphasis added.). See also 28 U.S.C. §§ 1254, subd. (1) and 2106.

An appellant is entitled to a ruling on each issue properly raised on appeal where the issues are neither numerous, nor overlapping nor frivolous. Where the issues are the propriety of separate dismissals made at different times for different reasons of two claims under different statutes against different parties, and the issues are raised in the Notice of Appeal and all the briefs and are not waived, the appellant is entitled to a ruling. If, for unexplained reasons, there was no ruling, this court, in the exercise of its supervisory powers under Supreme Court Rule 10.1 (a) should intervene and remand the case for decision.

Remand for Decision Below

In Blackburn v. Alabama, 354 U.S. 393 (1957), opinion on the merits at 361 U.S. 199 (1960), the Supreme Court stated,

> "[t]he record in this case leaves us uncertain whether petitioner's claim to the protection of the Due Process Clause of the Fourteenth Amendment to the United States Constitution was passed upon by the Court of Appeals of Alabama. [Citation omitted.] Accordingly, we vacate the judgment of the Court of Appeals and remand the cause to that court so that it may pass upon this claim. [Citation omitted.]."

Blackburn v. Alabama, 354 U.S. 393

(1957).

In the present case, as in Blackburn v. Alabama, it is necessary to remand to the lower court to preserve the petitioner's right to be heard at the appellate level and her right to seek review of the intermediate appellate court's decision in this court.

While a party may have only a statutory right to appeal or seek a writ of certiorari, there can be a denial of due process of law under the Fifth or Fourteenth Amendments to the U.S. Constitution if that statutory right is unduly abridged, as occurred here. In Societe Internationale, Etc. v. Rogers (1958) 357 U.S. 197, 209, 78 S.Ct. 1087, 1094, 2 L.Ed. 2d 1255, this court said, ". . . there are constitutional limitations upon the power of courts . . . to dismiss an action without

affording a party the opportunity for a hearing on the merits of his cause."

A district court's silence about its reasons for a decision requires remand, for its silence prohibits the Court of Appeals from examining the soundness of the district court's discretionary judgment. Norris v. City and County of San Francisco, 900 F.2d 1326, 1332 (9th Cir. 1990); DWG Corp. v. Granada Investments, Inc., 962 F.2d 1201, 1202 (6th Cir. 1992). While the Fifth Amendment to the U.S. Constitution is often not directly quoted, it applies to the action of a federal court of appeals in these circumstances.

When a pendent state claim is dismissed because the federal claims have been dismissed and the appellate court reverses the dismissal of a federal claim, the appellate court must also

reverse the remand of the state claim. Tiftarea Shopper, Inc. v. Georgia Shopper, Inc., 786 F.2d 1115, 1118 (11th Cir. 1986), an antitrust case.

CONCLUSION

Petitioner Hinton respectfully requests that the Supreme Court grant a writ of certiorari and immediately remand this case to the U.S. Court of Appeals for the Ninth Circuit with an order for it to (1) rule on the propriety of the district court's dismissal of Hinton's claim against the ERISA Plan defendants and (2) recall its remittitur to keep the related pendent claim for legal malpractice in the federal courts until the ERISA claims are resolved.

DATED: January 25, 1994

STEPHANIE NORDLINGER, ESQ.
RONALD DEAN, ESQ.
Attorneys for Petitioner,
HEATHER C. HINTON

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HEATHER C. HINTON,
Plaintiff-Appellant,

v.

NMI PACIFIC ENTERPRISES, formerly known as PACIFIC LIGHTING CORPORATION, as Employer, Plan Administrator, Plan Sponsor and Plan Fiduciary, PACIFIC LIGHTING CORPORATION DISABILITY BENEFIT PLAN, PACIFIC LIGHTING CORPORATION MEDICAL PLAN, PACIFIC LIGHTING CORPORATION DENTAL PLAN, PACIFIC LIGHTING CORPORATION PENSION PLAN, PACIFIC LIGHTING CORPORATION LIFE INSURANCE PLAN, and KATHE R. MOORE,
Defendants-Appellees.

No. 92-55493
D.C. No. CV-91-4057-KN
OPINION

Appeal from the United States District Court
for the Central District of California
David Kenyon, District Judge, Presiding

Argued and Submitted
August 4, 1993—Pasadena, California

Filed September 17, 1993

Before: James R. Browning, Jerome Farris and Paul J. Kelly*, Circuit Judges.

*Honorable Paul J. Kelly, Jr., Circuit Judge for the United States Court of Appeals for the Tenth Circuit, sitting by designation.

Opinion by Judge Kelly

SUMMARY

Civil Litigation and Procedure/Pleading/Statutes of Limitation

The court of appeals affirmed a judgment of the district court. The court held that leave to further amend a complaint was properly denied when the plaintiff failed to show that she could not have timely discovered the proposed material and when that material did not cure the defect cited in dismissal of her first amended complaint.

Appellant Heather Hinton, employed by appellee NMI Pacific Enterprises, became disabled in January 1988. She was terminated by Pacific nineteen days later, in connection with which she signed a termination agreement. Her application for disability benefits from one of Pacific's employee benefit plans was denied because under the plan her termination expressly eliminated her eligibility for benefits. In February, Hinton filed a claim against Pacific for California workers' compensation benefits.

In May 1991, Hinton filed a district court action against Pacific. She amended her complaint in September, seeking damages for violation of the Employee Retirement Income Security Act, alleging that she was terminated to prevent her from claiming benefits under Pacific's employee benefit plans based on her disability. Pacific's motion to dismiss, contending that the claim was time-barred, was granted.

Hinton filed what she designated a motion for reconsideration that was, in pertinent part at least, effectively a request to amend, contending for the first time that the limitations period was tolled by her California application for workers'

compensation benefits. The motion was denied and Hinton appealed.

[1] California permitted a wrongful termination claim, which if pleaded in tort was subject to a one-year limit, to be also pleaded in contract, but Hinton's action on her oral employment contract with Pacific was likewise barred by the applicable state two-year limit on oral contract actions. [2] Her contention that her action was timely under the state four-year limit on written contract actions because Pacific's benefit plans were in writing was without merit, since the gravamen of her action was that her wrongful termination denied her benefits under the plans, not that the benefit plans themselves were breached by Pacific.

[3] Since the precedential opinion on which the court relied in determining the appropriate California limitations statute to apply to Hinton's ERISA claim was filed in July 1991, before she amended her complaint to allege ERISA violations by Pacific, and was cited by Pacific in its motion to dismiss, [4] the court's finding that Hinton failed to show that she could not have timely discovered her proposed amended material provided a sufficient basis on which to affirm its denial of leave to amend.

[5] Additionally, however, Hinton's workers' compensation claim, which included a charge that Pacific terminated her employment in retaliation for her assertion of a work-related injury, did not toll the limitations period on the charge in her amended complaint that Pacific had forced her, in violation of ERISA, to sign a termination agreement for the purpose of interfering with her right to obtain plan benefits, since the two allegations were of *different* wrongs, and equity did not toll the statute for one while Hinton pursued only the other. Leave to amend was therefore properly denied because the amendment would not cure the defect on which dismissal was based.

COUNSEL

Ronald Dean, Pacific Palisades, California, and Stephanie Nordlinger, Los Angeles, California, for the plaintiff-appellant.

Melvin King, Larry I. Stein and John R. Ellis, Los Angeles, California, for defendants-appellees NMI Pacific Enterprises, Pacific Lighting Corporation Disability Benefit Plan, Pacific Lighting Corporation Medical Plan, Pacific Lighting Corporation Dental Plan, Pacific Lighting Corporation Pension Plan, and Pacific Lighting Corporation Life Insurance Plan. Kathe R. Moore, pro per, Los Angeles, California, defendant-appellee.

OPINION

KELLY, Circuit Judge:

Background

Plaintiff-appellant Hinton was a paralegal, employed by Defendant-appellee NMI Pacific Enterprises ("Pacific"). On January 6, 1988, Hinton became disabled and on January 15, 1988, she was informed by her supervisor that she was being fired. Ten days later, she executed a resignation agreement outlining the terms of her departure from Pacific. Below her signature, in her own handwriting, Ms. Hinton added:

> By signing this agreement, I understand that I do not give up my rights to seek reimbursement for disability under Worker's Compensation, the Company's disability insurance policy, and the Company's self-insurance, if any, for disability. I also understand that I do not give up my rights to unemployment insurance after my disability ceases.

Aplt. App., ex. A. Hinton applied for disability benefits and they were denied because Hinton had been "terminated," a condition which specifically eliminated eligibility for benefits under the several benefits plans for Pacific employees. On February 22, 1988, Hinton filed a worker's compensation claim against her employer for a shoulder injury. On April 19, 1988, Hinton filed another worker's compensation claim for a stress injury including chronic Epstein-Barr virus syndrome. In September 1988, Hinton filed a petition to obtain benefits pursuant to California Labor Code § 132(a).

On May 2, 1991, Ms. Hinton filed this action against Pacific and certain employees of Pacific, seeking declaratory relief and damages relating to her termination. Hinton also named her former attorney, Moore, as a defendant, alleging legal malpractice. In September 1991, Hinton amended her complaint to include the Pacific employee benefit plans ("the Plans") as Defendants.

The amended complaint contained three claims. *First*, Hinton sought declaratory relief against the Plans, arguing that she was still eligible for disability coverage. The gist of her argument was that although the disability plan stated that "[n]o employee shall be eligible to receive Disability Benefits following termination of employment," she was not "terminated" for the purposes of this provision. She reasoned that it would be improper to allow "termination" to encompass situations wherein the employer eliminated the employee solely to avoid ERISA benefits. And, of course, she had a claim pending against Pacific, her former employer, to that effect. The claim against Pacific was reworked as the *second* claim in the amended complaint and sought damages only for a violation of § 510 of ERISA.[1] The *third* claim in the

[1]Section 510 of ERISA (Employee Retirement Income Security Act), 29 U.S.C. § 1140, makes it

> unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exer-

amended complaint was against attorney Moore and substantially similar to the claim made against her in the first complaint.

On October 7, 1991, Pacific filed a motion to dismiss the first claim for failure to state a claim. Fed. R. Civ. P. 12(b)(6). Pacific argued that Hinton's claims were barred by the statute of limitations. After a hearing, the district court dismissed the ERISA § 510 claim with prejudice, finding that the two-year statute of limitations for wrongful termination based on the breach of an oral contract applied.

The Plans filed a motion to dismiss, which was also granted by the district court. The court reasoned that the theory supporting the claim against the Plans was dependant upon the claim against Pacific. On its own motion, the court ordered the claim against attorney Moore, the only claim remaining, remanded to Los Angeles Superior Court.

Hinton responded with a motion for reconsideration and, for the first time, argued that the statute of limitations was subject to tolling or, alternatively, that Pacific should be estopped from asserting a limitations defense. The court refused to reconsider, citing Local Rule 7.16.[2]

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cising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . . The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

Section 502 of ERISA, 29 U.S.C. § 1132, authorizes civil enforcement of ERISA provisions.

[2]Local Rule 7.16 of the United States District Court for the Central District of California provides:

7.16. *Motion for Reconsideration.* A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable

Hinton appeals the dismissals of her claims. We affirm.

Discussion

I. Statute of Limitations

The first dismissal granted by the district court was based upon a finding that Hinton had failed to file her claims against Pacific within the statute of limitations. The district court cited and relied upon *Felton v. Unisource Corp.*, 940 F.2d 503 (9th Cir. 1991), which held that laws pertaining to wrongful terminations are most analogous to § 510 claims under ERISA and should therefore lend their statute of limitations to such claims.

As the court in *Felton* explained, "[b]ecause the civil enforcement section of ERISA, § 502, 29 U.S.C. § 1132, does not provide its own statute of limitations, courts must determine the applicable limitation period." *Id.* at 510 (footnote omitted). The court then reviewed the variety of results reached by other circuits considering this question, concluding "[w]e find persuasive the reasoning of those courts which have found that a claim brought under § 510 is essentially an assertion that the employee was discriminated against based on either his application for insurance benefits or his pension eligibility." *Id.* at 512.

> Keeping in mind the federal policies behind ERISA, we hold that the most analogous state law claim

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diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

> would be wrongful termination against public policy or retaliatory discharge. In § 510 actions, the employer has fired or suspended the employee either to evade the public policies underlying ERISA or in retaliation for the employee's exercise of his right to insurance or retirement benefits. In addition, the remedies sought by wrongful termination plaintiffs, i.e., back pay, benefits due or reinstatement, are identical to those potentially available under § 502 of ERISA.

Id. (citations omitted).

[1] The analogous California statute, addressing the tort of wrongful termination, prescribes a one-year statute of limitations. Cal. Civ. Proc. Code § 340 ¶ 3. However, California allows a wrongful termination claim to be pleaded in contract as well. *Foley v. Interactive Data Corp.*, 765 P.2d 373 (1988). The employment contract between Hinton and Pacific was oral; the statute of limitations pertaining to oral contracts is two years, Cal. Civ. Proc. Code § 339, and as the district court noted, Hinton failed to file her action against her employer within that time.

[2] Hinton argues that the four-year statute of limitations for a written contract should apply because the *benefits packages* were in writing. However, our resort to state law is only to determine an analogy to the basic claim of wrongful termination actionable under § 510, not to delineate specific benefits pursuant to contract that may be reinstated if a termination was indeed wrongful. The very essence of Hinton's claim is that she was wrongfully terminated (and thus cut off from benefits), not that the written provisions of the benefits plan were breached by Pacific. Section 510 clearly punishes the wrongful discharge itself; any effect that employment status may have on benefits is one step removed from § 510.

Hinton also argues that because § 510 incorporates enforcement under § 502, the same statute of limitations used in

§ 502 should be adopted. While the remedies are borrowed from § 502, we are not persuaded that Congress has expressed an intent to adopt all other features of that section. The two sections remedy different wrongs; one section corrects any improper action taken with respect to the benefits plan itself and the other punishes an improper action taken with respect to the individual's employment status.

II. Hinton's Motion for Reconsideration

Hinton argues that her motion for reconsideration, which discusses possible tolling of the statute of limitations for the first time, should have been granted. In her motion, Hinton noted that she had applied for worker's compensation benefits in February 1988 and cited several cases which stand for the proposition that when a plaintiff files for worker's compensation benefits, the statute of limitations in any civil case brought in the future against the same defendant is tolled until after the worker's compensation case is finally decided. The district court, however, found that "plaintiff has failed to make a sufficient showing that notwithstanding the exercise of reasonable diligence, plaintiff could not have discovered the facts and/or law upon which this motion for reconsideration is based," E.R. Tab 26, as required by Local Rule 7.16, quoted *infra* note 2. A determination of compliance with local rules is reviewed on an abuse of discretion standard. *See Yagman v. Republic Ins.*, 987 F.2d 622, 630 (9th Cir. 1993).

[3] Hinton argues that *Felton* represented "new law" that she could not have anticipated and appropriately countered with allegations which could have tolled the statute of limitations. *Felton* was decided on July 31, 1991 — before the amended complaint was filed and, thus, before Hinton had made any claims against Pacific pursuant to ERISA. The amended complaint was filed in September 1991 with no mention of the statute of limitations. The motion to dismiss was heard in November of that year. *Felton* is cited in Pacific's motion to dismiss and Hinton, in her reply, attempts to

address *Felton* by summarily concluding: "Following this rule, plaintiff Hinton's claim is covered by the four-year statue of limitations [applicable to an action upon a written contract.]" E.R. Tab 13 at 1.

The burden of alleging facts which would give rise to tolling falls upon the plaintiff. *Conerly v. Westinghouse Elec. Corp.*, 623 F.2d 117, 120 (9th Cir. 1980); *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 249 (9th Cir. 1978). That burden does not arise only after a motion to dismiss; rather, the plaintiff "must plead with particularity the circumstances surrounding the concealment and state facts showing his due diligence in trying to uncover the facts." *Id.* at 250.

Hinton responds that compliance with this particular local rule is not necessary because it conflicts with the Federal Rules of Civil Procedure, particularly Rules 1, 15(a), 54(b), 41(b) and 59. Her motion was purportedly filed pursuant to Rules 15(a) (allowing amendments to pleadings) and 54(b) (order is subject to revision at any time before the entry of judgment). Rule 7.16 need not be read to conflict with any other rule of civil procedure.

However, we note that Ms. Hinton's appeal on this matter raises other concerns about the treatment of her motion. First, Rule 7.16 addresses a request for a court to consider again a motion that it previously considered. *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1441-42 (9th Cir. 1991). Thus, a party should indicate which federal rule governs the motion. *Id.* (motion for reconsideration of summary judgment is "appropriately brought under either Rule 59(e) or Rule 60(b)"). Fed. R. Civ. P. 15(a), upon which Hinton based her motion, is a new and separate motion to amend pleadings. Even though Hinton entitled her motion as one for "reconsideration" of the court's dismissal, at least part of her request and the federal rule cited within the caption relate to amending the complaint. Therefore, the trial court improperly subjected a new Rule 15(a)

motion to the test contained in Local Rule 7.16, which relates to a motion for reconsideration. We treat Hinton's motion as a request to amend and review the trial court's denial thereof.

Rule 15(a) allows one amendment of right, which Hinton utilized in this case to file her first amended complaint. Thereafter, any amendments, according to the rule, had to be made with leave of the court. *Sackett v. Beaman*, 399 F.2d 884 (9th Cir. 1968). The court may consider "the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party and futility of the proposed amendment." *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 538 (9th Cir. 1989). We review the district court's denial of leave to amend for abuse of discretion. *United Union of Roofers, Waterproofers and Allied Trades No. 40 v. Insurance Corp. of America*, 919 F.2d 1398, 1399 (9th Cir. 1990). If the amendments to the complaint will fail to cure fatally defective allegations, refusal to allow leave to file the amended complaint is acceptable. *Moore*, 885 F.2d at 538, 540-41.

[4] Using the criteria listed in Rule 7.16, the district court found that Hinton had failed to show that she could not have discovered the proposed amended material before the motion was submitted. This particular aspect of Rule 7.16 coincides with one of the criteria which may be considered upon a motion to amend, *see Moore*, 885 F.2d at 538, and may be a sufficient independent basis to have denied leave to amend. Finding no abuse of discretion in the district court's determination of this factor, we could affirm the denial of Hinton's motion to amend on this basis alone.

As to whether the proposed amendments would "cure" the defects noted in the court's ruling on the motion to dismiss, Hinton relies primarily on the tolling doctrine in *Elkins v. Derby*, 525 P.2d 81 (Cal. 1974). There, the court decided that the statute of limitations applicable to a personal injury suit filed by a worker was tolled during the pendency of his work-

er's compensation remedy. *Id.* at 82. This holding was based on the concept that a limitations period should be tolled " '[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one.' " *Id.* at 84 (quoting *Myers v. County of Orange*, 6 Cal.App.3d 626 (1970)). Indeed, in *Elkins*, the plaintiff had suffered injuries during an attack from a timber wolf and had available two avenues of remedy for those injuries.

[5] Hinton's situation is distinguishable. Her worker's compensation claim against Pacific included a charge that "[i]n retaliation for applicant's claim of a work related injury, defendant corporation abruptly terminated the applicant's employment . . . in violation of California State Labor Code § 132(a)." E.R. Tab 21. The amended complaint against Pacific alleges that "Pacific terminated Hinton and then extracted from her a resignation on threat of loss of benefits, for the purpose of interfering with her attainment of her rights under the defendant Plans [in violation of ERISA § 510]." E.R. Tab 9. As was explained in *Aerojet General Corp. v. Superior Court*, 223 Cal. Rptr. 249 (Cal. App. 1986):

> Though equity will toll the statute of limitations while a plaintiff, who possesses different legal remedies for the same harm, reasonably and in good faith pursues one, it will not toll the statute while a plaintiff, who has allegedly suffered several different wrongs, pursues only one remedy as to one of those wrongs. . . . [P]laintiffs' worker's compensation claim and their suit for fraudulent concealment are not alternative remedies for the same harm; they are different remedies for different harms. The filing of the former did not alert defendants to the nature or the imminence of the latter.

Id. at 254. Here, Hinton has alleged different wrongs. In one complaint, she alleges that her employment was terminated in retaliation for her filing worker's compensation claims. In the

other, she alleges that her employer forced her to sign a termination agreement in order to interfere with her right to obtain certain benefits. If she is successful in the former action, nothing will prevent her from continuing the latter action and recovering benefits due under § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), applicable penalties pursuant to § 502(c), 29 U.S.C. § 1132(c), and attorney's fees under § 502(g)(1), 29 U.S.C. § 1132(g)(1). "Indeed, it is precisely because these wrongs are different that [Hinton]'s state-law claims are not precluded by [ERISA]." *Arnold v. United States*, 816 F.2d 1306, 1313 (9th Cir. 1987) (citing *Otto v. Heckler*, 781 F.2d 754, 756-57 (9th Cir. 1986) *amended by* 802 F.2d 337 (1986)).

Finally, Hinton argues that her amended complaint would allege facts sufficient to show that Pacific is responsible for the delay in filing and should be estopped from asserting a limitations defense. Hinton's argument is premised on the difficulty she experienced in hiring counsel, which she attributes to the existence of the termination agreement she contends she was forced to sign. Hinton failed to raise this argument in the motion before the trial court, insisting that Pacific should be estopped for the first time before this court. The necessary elements were set out in *Golden v. Faust*, 766 F.2d 1339 (9th Cir. 1985):

> Before estoppel can toll the statute of limitations, certain conditions must be met: 1) the party to be estopped must be apprised of the facts; 2) the other party must be ignorant of the true state of facts, and the party to be estopped must have acted so that the other party had a right to believe that the party intended its conduct to be acted upon; and 3) the other party relied on the conduct to its prejudice.

Id. at 1341. Hinton has failed to sufficiently plead these elements such that a question of fact would arise. There is simply nothing in Hinton's allegation to support her ignorance of the

true state of the facts. Equitable estoppel has more to do with some element of the claim being hidden from the plaintiff due to a defendant's improper motivation or deceptive conduct rather than, as here, a plaintiff's mistake as to the law. *See Stallcop v. Kaiser Found. Hosp.*, 820 F.2d 1044, 1049-50 (9th Cir.), *cert. denied*, 484 U.S. 986 (1987); *Garabedian v. Skochko*, 283 Cal. Rptr. 802, 804 (Cal. App. 1991) ("As a general rule, absent some wrongdoing on the part of a defendant, a plaintiff's ignorance of his cause of action . . . does not prevent the running of the limitations period.").

Therefore, the proposed amendments would not have cured the statute of limitations defects. We affirm the district court's refusal to allow the amendments on this basis as well. *Moore*, 885 F.2d at 538-40 (court may refuse to grant leave to amend when, even if amendments were allowed, the claim would be subject to dismissal).

AFFIRMED.

APPENDIX B - ORDER DENYING REHEARING

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
OCT 27 1993

HEATHER C. HINTON, Plaintiff-Appellant, VS. PACIFIC ENTERPRISES, formerly known as PACIFIC LIGHTING CORPORATION, as Employer, Plan Administrator, Plan Sponsor and Plan Fiduciary, PACIFIC LIGHTING CORPORATION DISABILITY BENEFIT PLAN, PACIFIC LIGHTING CORPORATION MEDICAL PLAN, PACIFIC LIGHTING CORPORATION DENTAL PLAN, PACIFIC LIGHTING CORPORATION PENSION PLAN, PACIFIC LIGHTING CORPORATION LIFE INSURANCE PLAN, and KATHE R. MOORE, Defendants-Appellees.	)	CIVIL NO. 91-4057 KN(EX)

Before: BROWNING, FARRIS and KELLY*, Circuit Judges.

The petition for rehearing is denied.

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* Honorable Paul J. Kelly, Jr., Circuit Judge for the United States Court of Appeals for the Tenth Circuit, sitting by designation.

APPENDIX C
ORDER OF DISMISSAL AND REMAND

MELVIN KING
JOHN R. ELLIS, State Bar No. 081824
LARRY I. STEIN, State Bar No. 067679
633 West Fifth Street, Suite 5400
Los Angeles, CA 90071-2006
Telephone (213) 895-5132

Attorneys for Defendants,
PACIFIC ENTERPRISES; PACIFIC LIGHTING CORPORATION DISABILITY BENEFIT PLAN; PACIFIC LIGHTING CORPORATION MEDICAL PLAN; PACIFIC LIGHTING CORPORATION DENTAL PLAN; PACIFIC LIGHTING CORPORATION PENSION PLAN; and PACIFIC LIGHTING CORPORATION LIFE INSURANCE PLAN

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED
MAR 20 1992

HEATHER C. HINTON, Plaintiff, vs. PACIFIC ENTERPRISES, formerly known as PACIFIC LIGHTING CORPORATION, as Employer, Plan Administrator, Plan Sponsor and Plan Fiduciary; PACIFIC LIGHTING CORPORATION DISABILITY BENEFIT PLAN; PACIFIC LIGHTING CORPORATION MEDICAL PLAN; PACIFIC LIGHTING CORPORATION DENTAL PLAN; PACIFIC LIGHTING CORPORATION PENSION	) CIV NO. 91 4057 KN(Ex) ORDER OF DISMISSAL AND REMAND

PLAN; PACIFIC LIGHTING CORPORATION)
LIFE INSURANCE PLAN; and KATHE R.)
MOORE,)
Defendants.)
)

The motion of defendant Pacific Enterprises to dismiss the second cause of action of plaintiff Heather C. Hinton's first amended complaint for failure to state a claim upon which relief can be granted having been heard and granted on November 4, 1991; and the motion of defendants Pacific Enterprises, Pacific Lighting Corporation Disability Benefit Plan, Pacific Lighting Corporation Medical Plan, Pacific Lighting Corporation Dental Plan, Pacific Lighting Corporation Pension Plan, and Pacific Lighting Corporation Life Insurance Plan, to dismiss the first cause of action of plaintiff's first amended complaint for failure to state a claim upon which relief can be granted having been heard and granted on December 9, 1991, at

which time the Court on its own motion ordered that the remaining third cause of action of plaintiff's first amended complaint against defendant Kathe Moore be remanded to the Los Angeles Superior Court; and the motion of plaintiff for reconsideration of the dismissal of the second cause of action of plaintiff's first amended complaint in favor of defendant Pacific Enterprises having been heard and denied on January 27, 1992; it is hereby

ORDERED that the action be dismissed with prejudice as to defendants Pacific Enterprises, Pacific Lighting Corporation Disability Benefit Plan, Pacific Lighting Corporation Medical Plan, Pacific Lighting Corporation Dental Plan, Pacific Lighting Corporation Pension Plan, and Pacific Lighting Corporation Life Insurance Plan, and further it is hereby

ORDERED that the action is remanded to

the Superior Court of the State of California for the County of Los Angeles.

The motion for reconsideration is denied.

Dated: March 20, 1992

By /s/ David V. Kenyon
Judge,
United States District Court

APPENDIX D - MINUTE ORDER

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV91-4057-KN(Ex) Date Dec 9 1991
Title Heather C. Hinton vs. Pacific Enterprises

DOCKET ENTRY

PRESENT:

HON. DAVID V. KENYON, JUDGE

LENORA PULLIAM	DEBORAH PARKER
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

RONALD DEAN
STEPHANIE NORDLINGER

ATTORNEYS PRESENT FOR DEFENDANTS:

LARRY I. STEIN

PROCEEDINGS: Defendants' Motion to Dismiss 1st Cause of Action of Amended Complaint

Court Grants Defendants' Motion to Dismiss 1st Cause of Action of A/C as to Certain defts. Court on its Own Motion Orders this case Remanded to State Court.

Initials of Deputy Clerk /s/LP

MINUTES FORM 11
CIVIL--GEN D-M [Docket No.] 19

EXCERPT FROM REPORTER'S TRANSCRIPT OF RULING

[Page 1:]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

- - -

HONORABLE DAVID V. KENYON, JUDGE PRESIDING

- - -

HEATHER C. HINTON, PLAINTIFF, VS. PACIFIC ENTERPRISES, FORMERLY PACIFIC LIGHTING CORPORATION, AS EMPLOYER, PLAN ADMINISTRATOR, PLAN SPONSOR AND PLAN FIDUCIARY; PACIFIC LIGHTING CORPORATION DISABILITY BENEFIT PLAN; PACIFIC LIGHTING CORPORATION MEDICAL PLAN; PACIFIC LIGHTING CORPORATION DENTAL PLAN; PACIFIC LIGHTING CORPORATION PENSION PLAN; PACIFIC LIGHTING CORPORATION LIFE INSURANCE PLAN, and KATHE R. MOORE, DEFENDANTS.	CIVIL NO. 91-4057-KN (EX)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

MONDAY, DECEMBER 9, 1991

9:30 A.M.

DEBORAH D. PARKER, CSR
OFFICIAL COURT REPORTER

408 UNITED STATES COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012
(213) 894-6603

[Pages 2 and 3 - appearances and inconsequential preliminary remarks - are omitted.]

Page 4:

[THE COURT - Judge David V. Kenyon]

I'M READ TO RULE ON THIS CASE, IF YOU'RE READY TO LISTEN.

MR. DEAN [for Plaintiff]: YES, YOUR HONOR.

MR. ELLIS [for Defendants]: WE ARE.

THE COURT: ALL RIGHT. OKAY.

THE COURT GRANTS THE DEFENDANTS' MOTION TO DISMISS THE FIRST CAUSE OF ACTION OF THE PLAINTIFF'S FIRST AMENDED COMPLAINT WITH PREJUDICE AS TO DEFENDANTS PACIFIC LIGHTING CORPORATION DISABILITY PLAN, PACIFIC LIGHTING CORPORATION MEDICAL PLAN, PACIFIC LIGHTING CORPORATION DENTAL PLAN, PACIFIC LIGHTING CORPORATION PENSION PLAN, AND PACIFIC LIGHTING CORPORATION

LIFE INSURANCE PLAN, WHICH ARE COLLECTIVELY EMPLOYEE BENEFIT PLANS, ON THE GROUNDS THAT THE PLAINTIFF'S FIRST CAUSE OF ACTION FOR DECLARATORY RELIEF UNDER THE EMPLOYMENT RETIREMENT INCOME SECURITY ACT OF 1974 (ERISA) FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

THE COURT FINDS THAT PLAINTIFF'S FIRST CAUSE OF ACTION FAILS TO STATE A CLAIM AS A MATTER OF LAW BECAUSE PLAINTIFF ADMITS THAT SHE WAS TERMINATED AND AS SUCH, PACIFIC LIGHTING CORPORATION DISABILITY PLAN'S DECISION NOT TO PROVIDE HER WITH DISABILITY BENEFITS WAS ENTIRELY CONSISTENT WITH THE EXPRESS LANGUAGE OF THE DISABILITY PLAN PROVISION AS CITED BY THE PLAINTIFF. FURTHER THE COURT FINDS THAT THE PLAINTIFF'S FIRST

[Page 5:]

CAUSE OF ACTION ALLEGES THAT HER WRONGFUL TERMINATION CONSTITUTED AN IMPROPER BASIS

UPON WHICH SHE WAS DENIED EMPLOYEE BENEFITS. HOWEVER, THE PROPRIETY OF PLAINTIFF'S TERMINATION IS, UNFORTUNATELY, NOT AT ISSUE HERE SINCE THE PLAINTIFF'S SECOND CAUSE OF ACTION UNDER ERISA SECTION 510, 29 U.S.C., SECTION 1140, AGAINST DEFENDANT PACIFIC ENTERPRISES WAS PREVIOUSLY HELD BY THIS COURT TO BE TIME-BARRED.

FINALLY, THE COURT FINDS THAT PLAINTIFF'S CLAIMS FOR MEDICAL, DENTAL AND LIFE INSURANCE BENEFITS, AS WELL AS FOR PENSION BENEFITS, ARE ALL CONTINGENT UPON PLAINTIFF'S CLAIM FOR DISABILITY BENEFITS. THEREFORE, SINCE THE PLAINTIFF'S CLAIM FOR DISABILITY BENEFITS IS HEREBY DISMISSED, THE PLAINTIFF'S OTHER CLAIMS FOR BENEFITS SHOULD ALSO BE DISMISSED.

BASED ON THE FOREGOING, THE COURT GRANTS DEFENDANTS' MOTION TO DISMISS THE FIRST CAUSE OF ACTION OF HINTON'S FIRST AMENDED COMPLAINT WITH PREJUDICE, SINCE

ANY AMENDMENT IN THIS CASE WOULD BE FUTILE.

ON ITS OWN MOTION, THE COURT LIKEWISE REMANDS THIS CASE TO THE STATE COURT ON THE GROUNDS THAT PLAINTIFF'S THIRD REMAINING CAUSE OF ACTION AGAINST DEFENDANT KATHE R. MOORE IS A PENDENT STATE CLAIM AND THERE IS NO DIVERSITY OF CITIZENSHIP BETWEEN PLAINTIFF AND DEFENDANT MOORE. IT IS WELL-SETTLED LAW THAT A FEDERAL DISTRICT COURT HAS THE

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DISCRETION TO REMAND TO STATE COURT A REMOVED CASE INVOLVING PENDENT CLAIMS UPON PROPER DETERMINATION THAT RETAINING JURISDICTION WOULD BE INAPPROPRIATE.

I WILL NOT CITE A CASE ON THAT SCORE.

THE DEFENDANTS ARE REQUESTED TO PREPARE AN ORDER, PLEASE, IN ACCORDANCE WITH THIS RULING BY DECEMBER 23, 1991.

THANK YOU ALL.

MR. DEAN: THANK YOU, YOUR HONOR.

MR. ELLIS: THANK YOU, YOUR HONOR.

(PROCEEDINGS CONCLUDED.)

I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT FROM THE STENOGRAPHIC RECORD OF PROCEEDINGS IN THE FORFGOING MATTER.

/S/ DEBORAH D. PARKER JULY 29, 1992
DEBORAH D. PARKER JULY 29, 1992